(4)

No. 84-1198

# In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS, PETITIONER

*v.*

SANFORD JAMES MCCULLOUGH

*ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

1. Whether a presumption of vindictive sentencing attaches when the trial judge grants the defendant's motion for a new trial, the defendant elects to be sentenced by the judge, and the judge imposes a higher sentence than that imposed by the jury at the first trial.

2. Whether a presumption of vindictive sentencing can be rebutted by reliance for an increased sentence on new, objective information not known at the time of the first sentencing, but relating to events antedating that sentencing.

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## INTEREST OF THE UNITED STATES

This case involves an interpretation of the due process holding of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), which generally applies to the federal judicial system. The first question concerns whether a presumption of vindictiveness should arise under the circumstances here. While the precise facts here cannot arise in the federal system because there is no provision for jury sentencing, the decision in this case can be expected to shed light on the more general question of the applicability of *Pearce* where the sentencing judge himself or herself grants a new trial. The second question presented here—what type of in-

formation can be used to rebut a presumption of vindictive resentencing—is fully applicable to the federal criminal justice system. Indeed, the United States recently briefed this issue in *Wasman* v. *United States*, No. 83-173 (July 3, 1984). Accordingly, the decision in this case is likely to have a significant impact on federal prosecutions.

## STATEMENT

1. Following a jury trial, respondent was convicted of murder, in violation of Texas Penal Code Ann. § 19.02 (Vernon 1974). Pursuant to Tex. Stat. Ann. art. 37.07 (Vernon 1981 & Supp. 1985) (set forth at Pet. App. A19-A21), respondent elected to be sentenced by the same jury that decided his guilt. The jury imposed a sentence of 20 years' imprisonment. Thereafter, respondent filed a motion for a new trial, alleging improper jury argument and improper cross-examination by the prosecutor (J.A. 17-18). At a hearing on the motion, the State informed the judge that it did not oppose the motion and would agree to a new trial. The judge thereupon granted the motion.

In December 1980, respondent was retried before a new jury, but with the same judge presiding, and he was once again convicted of murder. This time, however, respondent elected to be sentenced by the trial judge, who imposed a sentence of 50 years' imprisonment.[1] Respondent moved for the entry of findings of fact explaining the increased sentence, which the judge did (Pet. App. A22-A24), although first expressing her conclusion that the prophylactic rule of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was

[1] The maximum permissible sentence for non-capital murder in Texas is 99 years' imprisonment. Tex. Penal Code Ann. § 12.32 (Vernon 1974).



not applicable "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial" (Pet. App. A22).

The judge nevertheless went on to place on the record certain findings in the event the appellate court disagreed with her on the applicability of *Pearce*. She relied principally on "newly developed evidence" that was presented for the first time at the second trial. The judge specifically focused on the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, which "directly implicated the [respondent] in the commission of the murder in question and showed what part he played in committing the offense" (Pet. App. A22). The judge found that their testimony "shed new light upon the [respondent's] life, conduct, and his mental and moral propensities" and provided "insight as to * * * [respondent's] propensity to commit brutal crimes against persons and to constitute a future threat to society" (*id.* at A23). The judge also noted that she learned for the first time at the second trial that respondent had been released from prison only four months before the crime occurred (*ibid.*). The judge further observed that respondent had never exhibited any signs of remorse upon retrial and never "show[ed] this court any sign or intention of refraining from criminal conduct in the future" (*id.* at A24). In addition, the judge stated that she would have sentenced respondent to more than 20 years at the first trial had respondent not elected to be sentenced by the jury (*ibid.*).

2. The Court of Appeals for the Seventh Supreme Judicial District of Texas affirmed respondent's conviction but vacated his sentence, holding that the increase violated *North Carolina* v. *Pearce*, *supra* (Pet.

App. A1-A7). Distinguishing *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the court held that the increase in respondent's sentence at retrial gave rise to a presumption of vindictiveness because that sentence had been imposed by a judge who knew of the first sentence, rather than a jury. And the court ruled that the presumption was not rebutted by the judge's reliance on new information regarding respondent's conduct prior to the first trial because *Pearce* states that the increase must be based on "conduct on the part of the defendant occurring *after* the time of the original sentencing proceeding" (395 U.S. at 726 (emphasis added)). See Pet. App. A4-A7.[2] Accordingly, the court resentenced respondent to 20 years' imprisonment, the sentence imposed by the jury at the first trial (*id.* at A7). On motion for rehearing, the court reaffirmed its holding that a presumption of vindictiveness applied in this case, deeming it immaterial that respondent's new trial was granted by the trial judge herself, rather than on appeal. *Id.* at A8-A9.

[2] The court added, however, that it viewed the cited language in *Pearce* as unduly restrictive and that it led to an unjust result here by requiring vacation of what was in fact a non-vindictive, appropriate sentence (Pet. App. A7 n.2):

> This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.



3. The Texas Court of Criminal Appeals granted review on its own motion to determine the authority of the court below to reform respondent's sentence. The court concluded that, as a matter of procedure, the Court of Appeals should not have reformed the sentence, but instead it should have remanded the case to the trial court for resentencing. The court did not question, however, the holding of the lower court that respondent's increased sentence violated his right to due process. Pet. App. A10-A11.

On the State's motion for rehearing, the Court of Criminal Appeals addressed the question whether vindictiveness should be presumed "where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial" (Pet. App. A12). The court concluded that "the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (Pet. App. A13-A14 (footnote omitted)). In so ruling, the court explained that the reasons given in *Chaffin* v. *Stynchcombe*, 412 U.S. at 26-27, for excluding jury sentencing from the *Pearce* rule were not applicable here (Pet. App. A15-A16).[3] The court added that it considered it irrele-

[3] This Court identified three factors in *Chaffin* that distinguished jury sentencing from *Pearce*. Looking to those factors, the court below reasoned (Pet. App. A16): (1) unlike the ignorant jury in *Chaffin*, the trial judge here knew what sentence had been imposed at the first trial; (2) unlike *Chaffin*, "the second sentence [here] was in fact 'meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required' a new trial" (quoting *Chaffin*, 412 U.S. at 27); and (3) unlike the

vant that respondent could have chosen to be sentenced by a jury and in fact had done so at his first trial, rejecting the State's contention that the *Pearce* presumption does not attach when a different sentencing authority assesses the punishment on retrial.

## SUMMARY OF ARGUMENT

### I.

In the circumstances presented here, a presumption that the sentence increase was motivated by vindictiveness is not rational. In contrast to the prototypical *Pearce* situation, where the sentencing judge is reversed on appeal because a different court has found error in the handling of the first trial, the new trial here was ordered by the sentencing judge herself. Therefore, the retrial is neither a personal nor an institutional affront to the sentencing court. The sentencing court is not being directed "to do over what it thought it had already done correctly" (*Colten* v. *Kentucky*, 407 U.S. 104, 116-117 (1972)), nor is there any basis for a motivation of "self-vindication" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 27 (1973)). In short, there is simply no reason to presume that the sentencer feels any resentment towards the defendant for obtaining a new trial when the sentencer has already gone on record as finding that a new trial is fully justified. Hence, there is no reason to anticipate that the sentencer would act vindictively in sentencing the defendant after the retrial.

Moreover, the first sentence here was imposed by a jury, not by the judge who imposed the "increased" sentence after a retrial. Where both sentences are

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jury in *Chaffin*, the judge here was likely to be sensitive to the institutional interests that might be served by discouraging meritless appeals through increased sentences.



imposed by the same sentencing authority one would normally expect that, in the absence of changed circumstances, the sentence after a retrial will be the same as it was following the first trial. If it is instead more severe, a rebuttable presumption of vindictiveness makes considerable sense. If there are valid reasons for the change in sentence, the judge should be able to state them; in the absence of a stated justification, it is not unreasonable to presume that the motivation for the sentence increase is an impermissible one—retaliation for the defendant's exercise of a procedural right. When the second sentencer is different from the first, however, the most likely explanation for the sentence disparity is different sentencing philosophies of the two sentencers. There has not really been any sentence "increase," just a different sentence. In this situation, it cannot be said that the mere fact of a sentence increase poses a "realistic likelihood of vindictiveness" (*United States* v. *Goodwin*, 457 U.S. 368, 384 (1982) (internal quotations omitted)) that ought to give rise to a presumption of vindictiveness.

Finally, even if a reasonable apprehension of vindictiveness could exist and justify application of the *Pearce* presumption in the normal case, in which the second sentencing is by a different judge, such an approach is entirely inappropriate here because the defendant deliberately chose to place himself in the position of which he now complains; he could have elected to be sentenced by the jury, as he was at his first trial, and thereby eliminated any possibility of vindictive sentencing.

### II.

Assuming arguendo that a presumption of vindictiveness is appropriate in this case, the court below erred in holding that the presumption could be re-

butted only by reliance on events that occurred subsequent to the first sentencing proceeding. While this rule finds support in dictum in *Pearce*, it bears no logical relationship to the policies underlying the *Pearce* rule. The requirements of due process plainly ought to be satisfied if the reasons given by the judge for the sentence increase persuade a reviewing court that there was a sound, non-vindictive basis for the sentence. It is not apparent why these reasons cannot include new information that comes to light for the first time at the retrial but relates to conduct of the defendant that occurred prior to the first trial—for example, the discovery that the defendant has an extensive criminal record.

## ARGUMENT

### THE TEXAS COURT ERRED IN RULING THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE VIOLATED DUE PROCESS

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court addressed the due process implications of the possibility that defendants who successfully appeal or collaterally attack their convictions may receive more severe sentences after retrial as a punishment for exercising their rights. The Court concluded that when a defendant receives a higher sentence upon reconviction after a successful appeal than he received after his first trial, the danger that the increased sentence is a product of vindictiveness (*i.e.*, intended to retaliate against him for the successful exercise of his procedural rights or to discourage the exercise of those rights by others in the future) is sufficiently high that a prophylactic rule is appropriate to eliminate such vindictiveness. Accordingly, the Court held that when a defendant successfully



challenges his conviction on appeal or collateral attack, due process requires that a presumption of vindictiveness attach to a more severe sentence at the second trial and that such a sentence is invalid unless the sentencing judge places on the record adequate reasons that objectively justify the sentence increase. 395 U.S. at 723, 726. On several occasions since *Pearce* the Court has confronted different sorts of situations involving either sentence increases or increases in charges by the prosecutor and has considered the question whether those situations present a sufficient " 'realistic likelihood of "vindictiveness" ' " (*United States* v. *Goodwin*, 457 U.S. 368, 384 (1982), quoting *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)) that a presumption of vindictiveness is warranted.

In this case the court below erred in two distinct respects. First, the possibility that an increased sentence in the situation presented here is the product of vindictiveness is so remote that a presumption of vindictiveness plainly is not warranted. Second, assuming that such a presumption were applicable, the court took an unduly narrow view of the type of information that may be relied upon by the sentencing judge to justify an increased sentence and therefore rebut the presumption of vindictiveness.

### I. IT IS INAPPROPRIATE TO PRESUME THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE WAS A PRODUCT OF VINDICTIVENESS

#### A. When It Is The Sentencing Judge Who Grants The Retrial, There Is No Reason To Presume That The Burden Of Retrial Will Impel The Judge To Sentence Vindictively

While *Pearce* itself does not shed much light on the matter, subsequent decisions have identified considerations that are relevant in assessing whether there is

a sufficient likelihood of retaliatory motivation in a given context to warrant a presumption of vindictiveness. These considerations, while supporting the existence of such a presumption in the traditional *Pearce* context of retrial following reversal on appeal, strongly suggest that there is no reason to presume vindictiveness in the situation presented here and hence that a prophylactic rule barring an increased sentence on retrial is not appropriate.

In *Colten* v. *Kentucky*, 407 U.S. 104, 112-119 (1972), the Court declined to extend the *Pearce* presumption to the context of a two-tier prosecution system in which the defendant could appeal automatically from a conviction in an inferior court and obtain a new trial in a court of general jurisdiction. The Court explained that *Pearce* did not hold that the mere fact of reconviction and a higher sentence gave rise to a presumption of vindictiveness, and it concluded that there was no inherent danger that a higher sentence at the second stage of a two-tier prosecution would be motivated by vindictiveness. The Court noted that, in contrast to *Pearce*, the court imposing the higher sentence was a new one, "not the court that is asked to do over what it thought it had already done correctly" (407 U.S. at 116-117).

In *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court held that the *Pearce* presumption was not applicable even in the traditional setting of a retrial following reversal on appeal, if the higher sentence was imposed by a jury, because jury resentencing posed no "real threat of vindictiveness" (*id.* at 28, footnote omitted).[4] The Court explained that the

[4] In *Pearce*, the Court summarized its holding as requiring a statement of reasons "whenever a judge imposes a more severe sentence upon a defendant after *a new trial*" (395 U.S. at 726 (emphasis added)). Both *Colten* and *Chaffin* make



"first prerequisite for the imposition of a retaliatory penalty"—knowledge of the prior sentence—was absent in the jury resentencing context (*id.* at 26). The Court also identified two other factors present in *Pearce* whose absence in the jury sentencing context further diminished the possibility of vindictiveness in the latter case. Where "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction," the sentencer has "no personal stake in the prior conviction and no motivation to engage in self-vindication" (*id.* at 27). And "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals" (*ibid.*; footnote omitted). In *United States* v. *Goodwin*, 457 U.S. at 383, the Court reemphasized the significance of these two factors in holding that a presumption of vindictiveness is not warranted when the prosecutor increases the charges after a defendant elects to be tried by a jury. See generally *Wasman* v. *United States*, No. 83-173 (July 3, 1984), slip op. 6-9.

Upon examination of these considerations, it is apparent that a presumption of vindictive increase of sentence should not attach when the retrial is ordered by the sentencing judge. In this situation the sen-

clear that this is an overly broad statement of the Court's holding. *Pearce* imposes a prophylactic rule in the particular situation presented to the Court there or a closely analogous one—resentencing by the same judge at a retrial following reversal on appeal or collateral attack. In other situations where a new trial is held, such as in *Colten* and *Chaffin*, the rule may not apply, depending upon the likelihood in the particular situation that an increased sentence would be the product of vindictiveness.

tencing court is not being asked "to do over what it thought it had already done correctly" (*Colten*, 407 U.S. at 116-117); to the contrary, that court has already gone on record as agreeing with the defendant that a retrial is appropriate. The sentencing judge has not been criticized, even implicitly, by another court for his handling of the first trial; he has suffered no personal rebuke and accordingly, "unlike the judge who has been reversed," he has "no motivation to engage in self-vindication" (*Chaffin*, 412 U.S. at 27).[5] The judge cannot feel unjustly burdened by having to retry the case when he himself has ordered the retrial; he could simply have denied the motion for a new trial if he believed the defendant was not entitled to it. By the same token, there is no "institutional interest[] [in] * * * discouraging * * * meritless appeals" (*ibid.*; footnote omitted) that might motivate an increased sentence when the sentencing judge has already concluded that the appeal (or new trial motion) in fact does have merit. Finally, the sentencing judge's willingness to grant the defendant's request for relief strongly indicates that he is disposed to treat the defendant fairly, and there is no reason to presume that he will rely upon impermissible, vindictive factors in imposing sentence.

Moreover, apart from the fact that the sentencing judge himself has recognized the need for a retrial, it is relevant that the burden imposed upon the judicial system by the grant of a new trial is usually con-

[5] Where the basis of the defendant's request for a retrial is alleged excesses by the prosecutor, as in this case, rather than an erroneous ruling by the presiding judge, it is even less likely that the judge will treat the retrial as a personal affront and be motivated to use his sentencing power to punish the defendant.



siderably less than when a conviction is reversed on appeal as in *Pearce*. In most cases where a new trial is granted by the presiding judge, only a short time has elapsed since the conclusion of the first trial.[6] The case will still be fresh in the minds of the court and the parties, and the burden on the judicial system system as a whole, with respect to such matters as recalling witnesses and reassembling evidence, is not as severe as when a case is reversed on appeal long after the trial. In short, "the institutional bias against the retrial of a decided question that supported the decisions in *Pearce* and *Blackledge*" (*Goodwin*, 457 U.S. at 383) is not nearly as strong in this context.

Thus, with one exception, every relevant consideration suggests that the situation presented here is like *Chaffin*, and unlike *Pearce*, and therefore that it is not appropriate to apply a presumption of vindictiveness to a sentence increase on retrial. It is true that in this case, unlike *Chaffin*, the judge who imposed the more severe sentence was aware of the sentence imposed at the first trial. But it is manifest that this fact alone does not justify a presumption of vindictiveness. The Court has correctly characterized such knowledge of the prior sentence as a "prerequisite" for a vindictive sentence increase (*Chaffin*, 412 U.S. at 26). A judge who wants to impose a higher sentence on retrial in order to punish a defendant for taking an appeal or discourage others from doing so

[6] For example, under Fed R. Crim. P. 33, new trial motions must be filed within seven days of the verdict, unless the motion alleges the discovery of exculpatory evidence, in which case the motion must be filed within two years of the final judgment. In the instant case, respondent's first trial took place in September 1980 and the retrial took place in December 1980 (Pet. App. A2).

needs to know what the original sentence was. But granting that knowledge of severity of the original sentence gives the sentencer the *opportunity* to increase the sentence for vindictive reasons, this manifestly does not establish a sufficient basis for the imposition of a presumption of vindictiveness (see *Goodwin*, 457 U.S. at 384). The mere fact of knowledge of the first sentence sheds no light at all on the critical question—whether there is a reasonable likelihood that an increased sentence is vindictively motivated. Indeed, the Court has made it plain that knowledge of the first sentence does not alone provide a basis for establishing a presumption of vindictiveness. In *Colten*, the sentencing judge was aware of the first sentence when he imposed a higher sentence. See 407 U.S. at 118 n.14. And, of course, prosecutors who increase charges are aware of the level of the original charges, but their actions are not generally presumed to be motivated by vindictiveness. See *Goodwin*; *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). There is simply no reason to expect that a judge who grants a defendant a new trial will use his sentencing power to punish the defendant for exercising his rights; accordingly, the *Pearce* presumption of vindictiveness should not apply in that context.[7]

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[7] The fact that no presumption of vindictiveness attaches in the generality of cases does not "foreclose the possibility that a defendant in an appropriate case might prove objectively" that a sentence increase was motivated by a desire to punish him for exercising his rights. See *Goodwin*, 457 U.S. at 384. For example, if the same judge who sentenced a defendant at his first trial sentenced him to a substantially higher sentence after a retrial, with no apparent change in circumstances or other justification, that would likely provide an evidentiary basis for a finding of vindictiveness; that is not the same as *presuming* vindictiveness from the mere fact of an increase, without any evidentiary basis.



**B. The Prophylactic Rule Of *Pearce* Should Not Apply Where The First Sentence Is Imposed By A Jury And The Defendant Elects To Have His Sentence At Retrial Imposed By The Judge**

1. The Texas Court of Criminal Appeals rejected the State's argument that *Pearce* was inapplicable here because a different sentencing authority assessed the punishment on retrial. The court correctly noted that in *Pearce* itself different judges had presided over the two trials. See Pet. App. A17-A18; see also *Chaffin*, 412 U.S. at 41 n.4 (Marshall, J., dissenting). And the lower courts generally have taken *Pearce* to mean that the prophylactic rule applies even where the second sentence is imposed by a different judge. See, *e.g.*, *United States* v. *Whitley*, 759 F.2d 327, 329-330 (4th Cir. 1985) (en banc), petition for cert. pending, No. 84-6980; *United States* v. *Hawthorne*, 532 F.2d 318, 323 (3d Cir. 1976); *United States* v. *Floyd*, 519 F.2d 1031, 1034-1035 (5th Cir. 1975). The Court in *Pearce*, however, did not mention that the second sentence was imposed by a different judge, and it clearly did not focus on that fact. See *Hardwick* v. *Doolittle*, 558 F.2d 292, 299 & n.3 (5th Cir. 1977). In light of the Court's subsequent elucidation of the considerations underlying *Pearce*, it seems questionable at best for the prophylactic rule to apply when the judge who imposes the more severe sentence after retrial is not the judge who imposed the original sentence.

The realistic likelihood of vindictiveness that gave rise to a presumption in *Pearce* derives in large part from the personal stake that a judge has in the pro-

ceedings that have been reversed on appeal. See *Goodwin*, 457 U.S. at 383; *Chaffin*, 412 U.S. at 27. When the authority that imposes the higher sentence is different from the earlier sentencer, that personal stake with its accompanying stimulus to retaliatory motivation is absent, and hence the likelihood that the sentence is the product of vindictiveness is considerably diminished. See *Thigpen* v. *Roberts*, No. 82-1330 (June 27, 1984), slip op. 4; *Colten*, 407 U.S. at 116-117.

More important, the fact that the second sentencer is different provides a logical, non-vindictive reason for the difference in sentence. When a judge imposes one sentence on a defendant and then later, after a successful appeal and a second trial, imposes a higher sentence on the same defendant convicted of the same offense, the result is a peculiar one that begs for an explanation. Two possible explanations for the sentence increase come to mind: either (1) the judge has increased the sentence to retaliate for the defendant's exercise of his right to appeal and/or to discourage such appeals in the future; or (2) new information has come to light subsequent to the first sentencing proceeding that in the judge's view warrants a more severe sentence. In this situation, the prophylactic rule of *Pearce* makes considerable sense. The sentence is presumed to be motivated by vindictiveness, but the judge may rebut the presumption of vindictiveness by placing on the record rational, nonvindictive, newly learned reasons for increasing the sentence.

When the second sentence is imposed by a different judge, however, the situation is completely different. Judges are invested with wide discretion in sentencing, and the process is inherently quite subjective.



See, *e.g.*, *Wasman* v. *United States*, slip op. 4; *Williams* v. *Illinois*, 399 U.S. 235, 243 (1970). The most logical explanation for the sentence disparity is simply the different sentencing theories or approaches of the respective judges. The higher sentence imposed by the second judge most likely indicates that that judge would have given a more severe sentence had he or she presided at the first trial as well; this turn of events surely redounds to the detriment of the defendant, but that does not make the second sentence vindictive or in any way violative of due process. The sentence has not been "increased" in the sense that it is when the sentencing authority remains the same; the sentences are simply different. Generally "it no more follows that [the second] sentence is a vindictive penalty for seeking a [new] trial than that [the first judge] imposed a lenient penalty." *Colten*, 407 U.S. at 117.[8]

This is not to say that there is no possibility that a new sentencer might impose a more severe sentence at retrial because of a desire to punish a defendant for taking an appeal. There are institutional interests in limiting the retrial of apparently settled

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[8] In this case the sentencing judge stated her belief that the 20-year sentence imposed by the jury at the first trial was unduly lenient (Pet. App. A24). The circumstances suggest that this view was a reasonable one. Petitioner's brief reveals (at 6 n.1) that each of the other two participants in this brutal murder was sentenced to a 50-year term of imprisonment. Indeed, the State apparently was willing to risk its conviction and acquiesce in a new trial because of its view that the first sentence was unduly lenient and that a second sentencing authority would be likely to impose a higher sentence (Pet. App. A4). (At that time, of course, the State and the judge did not know that respondent would elect to be sentenced by the judge rather than by the second jury.)

issues that may transcend the personal involvement of particular judges. See *Goodwin*, 457 U.S. at 383. But that possibility existed in *Colten* and was not found sufficient to support the presumption of vindictiveness. This is because where the second sentencer is different, it is manifest that such a vindictive motivation is a considerably less likely explanation for the sentencing disparity than the simple fact that different judges have different attitudes towards sentencing. Indulging a presumption of vindictiveness when a new sentencer imposes a more severe sentence on retrial designates as the reason for the sentence, unless rebutted, what is in fact an unlikely explanation. Therefore, applying the prophylactic rule of *Pearce* in this situation appears quite inconsistent with the Court's established principle that " 'the Due Process Clause is not offended by all possibilities of increased punishment upon retrial * * *, but only by those that pose a realistic likelihood of "vindictiveness." ' " *Goodwin*, 457 U.S. at 375 (quoting *Blackledge* v. *Perry*, 417 U.S. at 27). See especially *United States* v. *Hawthorne*, *supra*; *United States* v. *Floyd*, *supra* (*Pearce* presumption applied even though second sentencing judge deliberately insulated himself from knowledge of prior proceedings).

2. In any event, even if it were deemed generally appropriate to apply the prophylactic rule of *Pearce* despite the fact that the higher sentence has been imposed by a different sentencing authority, it is not appropriate to do so on the facts of this case. To the extent respondent was exposed to any danger of vindictive sentencing it was solely as a result of his choice of sentencer. Respondent could have avoided any possibility of vindictive sentencing simply by choosing to be sentenced by the jury, as he had done



at the first trial. See *Chaffin* v. *Stynchcombe*, *supra*. Indeed, under the Texas system allowing jury sentencing, the *Pearce* rule is not as a general matter necessary to protect defendants in respondent's position against any "chilling effect" on their right to seek a new trial that might arguably be caused by the possibility of vindictive sentencing;[9] the defendant can eliminate any such risk by electing jury sentencing.

In fact, it seems quite likely that respondent chose to be sentenced by the judge at his retrial precisely because he feared that a jury might impose—for wholly legitimate, non-vindictive reasons—a more severe sentence on him than he had received the first time, and he believed that, by choosing to be sentenced by the judge, *Pearce* would preserve his lenient sentence as a maximum. This strategy perverts the due process protection recognized in *Pearce* by using it as

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[9] The Court has stated that the *Pearce* rule is designed to protect against both actual vindictiveness and the reasonable apprehension of vindictiveness that might deter a defendant's exercise of his right to challenge his conviction. *Blackledge* v. *Perry*, 417 U.S. at 28. At the same time, it is clear that *Pearce* does not protect against the "chilling effect" that may result simply from the possibility of an increased sentence based on non-vindictive reasons. See *Chaffin*, 412 U.S. at 29-35. While there has been some disagreement about the scope of the protection against the reasonable apprehension of vindictiveness (see generally *Wasman* v. *United States*, *supra*), it seems apparent that the two protections merge, as a practical matter, when assessing whether a presumption of vindictiveness is warranted in a particular situation. If a situation does not present a "realistic likelihood of vindictiveness" (see *Goodwin*, 457 U.S. at 384), then there is little danger of either actual vindictiveness or the reasonable apprehension of vindictiveness, and *Pearce* does not require the imposition of a prophylactic rule presuming vindictiveness.

a sword rather than a shield. See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 9. The *Pearce* rule is designed to protect defendants against vindictive resentencing, and it should not be applied in a case like this, where it would serve no function other than to secure a windfall for the defendant in the form of an unduly light sentence.

In sum, under the circumstances here, where the judge who imposed the more severe sentence on retrial did not impose the earlier, more lenient, sentence, and where the second sentencing judge herself granted the new trial motion, the possibility that the more severe sentence was motivated by vindictiveness is far too remote to support a rational presumption that the sentence increase was in fact vindictive. Such a rule would seriously undermine the policy of rational sentencing, which depends on the sentencing authority's ability to consider all relevant information and impose the sentence deemed most appropriate in light of that information (see *Wasman* v. *United States*, slip op. 4; *Williams* v. *New York*, 337 U.S. 241, 247 (1949)), while not advancing at all the policies of the Due Process Clause.

## II. A PRESUMPTION OF VINDICTIVENESS MAY BE REBUTTED IF THE INCREASED SENTENCE IS REASONABLY BASED ON NEW, OBJECTIVE INFORMATION NOT KNOWN AT THE TIME OF THE FIRST SENTENCING

Assuming arguendo that a presumption of vindictiveness is appropriate in this case, the question arises whether the reasons given by the judge for the sentence increase suffice to rebut that presumption. The court below held that the reasons given here—relating to new information that had come to light in connection with the second trial—could not be considered



because *Pearce* permits reliance only on information concerning events taking place after the first trial (Pet. App. A13-A14; see also *id.* at A6-A7). There is undoubtedly support for this position in the language of *Pearce*, which stated in its summary of the prophylactic rule that the presumption could be rebutted only by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726) and earlier referred to "events subsequent to the first trial" (*id.* at 723). In our view, however, *Pearce* should not be applied to establish a broad, inflexible rule barring reliance upon newly learned information that relates to events that occurred prior to the first sentencing proceeding. To the extent that *Pearce* sets forth such an inflexible approach, the rule is pure dictum that was not given adequate consideration by the Court. In fact, such an inflexible rule is at odds with the reasoning underlying *Pearce* and its progeny, and we submit that the broad limitation stated in *Pearce* and relied upon by the court below ought not to be uncritically accepted here.

A. It cannot be doubted that the broad statement in *Pearce* restricting the information that may be used to justify a higher sentence on retrial, on which the court below relied, was pure dictum.[10] In neither

[10] Three of the eight Justices clearly joined in this dictum. Justice White, concurring in part, specifically noted his disagreement with it, stating that, in his view, due process permitted a sentence increase on the basis of "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (395 U.S. at 751). Justices Douglas, Marshall, and Harlan concurred in part on the ground that the Double Jeopardy Clause prohibited any increase in sentence on retrial (*id.* at 726-737; *id.* at 744-

*Pearce* nor its companion case did the State come forth with any reason to justify the sentence increase (see 395 U.S. at 726); hence, the presumption of vindictiveness that the Court held applicable necessarily required overturning the increased sentences, even if there were *no* limitation on the type of reasons that legitimately could rebut the presumption. Moreover, it is surely accurate to say that in *Pearce* the "possible bearing [of the prophylactic rule as stated] on all other cases [was not] completely investigated." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 400 (1821). None of the briefs in the cases addressed the question of dispelling a presumption of vindictiveness.[11] Thus, in formulating the standard set forth in *Pearce*, the Court was completely without the "sharpen[ing of] the presentation of issues" provided by the adversary process, "upon which the court

751). These Justices did not specifically discuss the appropriate parameters of the Court's due process holding, although Justice Harlan expressed some doubt concerning the merit of a distinction between events occurring after the first trial and prior misconduct subsequently discovered (*id.* at 750 n.8). Justice Black dissented from the Court's due process holding in *Pearce*, stating that he did not believe the Constitution required any statement of reasons by the second sentencing court (*id.* at 740-743).

[11] The focus of the litigation in *Pearce* was on the propriety of imposing an increased sentence at all. The States argued that there was no constitutional bar to such an increase. The respondents argued that in no circumstances could a sentence be increased on retrial; this argument was based primarily on the grounds that any increase would violate double jeopardy or unconstitutionally burden the right to appeal. See *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967). The parties did not focus on the possibility of a middle ground, namely, that a sentence increase would be permissible, but only under certain circumstances.



so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 28 & n.28 (noting that jurisdictional question implicitly decided in other cases remained open where not briefed or discussed in those cases); *Stone* v. *Powell*, 428 U.S. 465, 481 (1976). In these circumstances, it would run contrary to the Court's normal principles of decision to accept uncritically, in a case where the issue is actually presented for decision, the *Pearce* formulation that places a temporal limitation on the type of evidence that may be considered by the sentencing judge. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) at 399.

Indeed, this Court's own subsequent treatment of the *Pearce* formulation indicates that the language of that opinion is not necessarily to be construed inflexibly. In *Goodwin*, the Court, rather than repeating *Pearce*'s restrictive formulation, stated that the presumption of vindictiveness "may be overcome only by objective information in the record justifying the increased sentence." 457 U.S. at 374 (footnote omitted).[12] And in *Wasman* the Court *held* that the prophylactic rule of *Pearce* should not be interpreted as broadly as it is stated. Despite the fact that the *Pearce* formulation states that only "conduct on the part of the defendant" occurring after the first trial can be considered in dispelling the presumption of

[12] See also 457 U.S. at 376 n.8 (noting that analogous *Perry* presumption of prosecutorial vindictiveness can be "overcome by objective evidence justifying the prosecutor's action"); *id.* at 386 (Blackmun, J., concurring in the judgment) ("prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably have been aware of at the time charges were initially filed").

vindictiveness (395 U.S. at 726), the Court held unanimously that relevant information that did not fit that description (entry of a conviction) could in fact be relied upon to increase a sentence. The Court found it unnecessary to reach our argument that *Pearce* similarly should not impose a rigid temporal limitation on the consideration of relevant sentencing information, but it apparently regarded the question as an open one. See *Wasman*, slip op. 13 n.*.[13] Accordingly, this issue is not foreclosed by *Pearce*.

B. The inflexible rule applied by the court below does not logically advance the policies underlying *Pearce*. Under the rationale of *Pearce* and its progeny, the requirements of due process ought to be satisfied if the reasons given by the judge for the sentence increase provide a sound, non-vindictive basis for any increased severity. The existence of a newly learned, objective justification for a more severe sentence would demonstrate to a reviewing court that the sentencing court likely did not retaliate against the defendant for the exercise of a legal right and hence would undercut the validity of any presumption of vindictiveness. In particular, the requirement that the sentencing court's reasons be placed on the record subject to scrutiny by a reviewing court effectively eliminates the risk that the increased sentence was motivated, even subconsciously (see *Goodwin*, 457 U.S. at 377), by a desire to punish the de-

[13] By the same token, in *Michigan* v. *Payne*, 412 U.S. 47 (1973), the State argued that the reasons given by the judge for increasing the sentence on retrial, which related primarily to new evidence concerning the crime brought out at the second trial rather than events that happened after the trial (see *id.* at 48 & n.1), satisfied *Pearce*. While the Court did not reach this contention because of its retroactivity holding, it apparently considered it to be an open question (*id.* at 49).



fendant for causing a retrial. Therefore, it would seem that the Constitution should permit any objective factual information not available at the first sentencing proceeding to be set forth as a justification for a higher sentence on retrial. Cf. *Pearce*, 395 U.S. at 751 (White, J., concurring).[14] This surely is consonant with the long-accepted proposition that the judge's selection of an appropriate sentence is enhanced by "the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. at 247 (footnote omitted).

The theoretical basis underlying the presumption of vindictiveness imposed in *Pearce* does not in any way justify placing a temporal limitation on the type of information that the judge may consider. No logical reason that advances the goal of insuring against vindictive resentencing supports a distinction between

[14] We recognize that not every factor that might conceivably have been taken into account at the first sentencing provides a sufficient justification for a sentence increase, thereby dispelling any presumption of vindictiveness that attaches to a sentence increase. In many cases, there will be some relevant information adduced at the second proceeding that was not available at the first, but the information will not necessarily be of sufficient importance to justify a sentence increase. Because it is possible that a judge who does in fact increase a sentence for vindictive reasons would be able to defeat the protection of *Pearce* by hiding behind an assertion that such new information justified the increased sentence, it is appropriate that a sentence increase where the *Pearce* rule applies should be subject to exacting appellate review even though an ordinary sentence would not be. The defendant should be entitled to argue on appeal that the reasons given do not reasonably justify the sentence increase and therefore that the sentence increase lacks "'constitutional legitimacy.'" *Wasman*, slip op. 5 (quoting *Goodwin*, 457 U.S. at 374).

events that actually occur after the first sentencing proceeding and events that occur earlier but are not discovered until afterward. As the Court said in *Wasman*, "[e]ven without a limitation on the type of factual information that may be considered, the requirement that the sentencing authority * * * detail the reasons for an increased sentence * * * enables appellate courts to ensure that a nonvindictive rationale supports the increase" (slip op. 12).

Indeed, application of the limitation set forth in *Pearce* can lead to absurd results that could not possibly have been intended by the Court. Suppose, for example, that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender. Indeed, it is conceivable that a recidivist statute would *require* that he be given a higher sentence because of the prior convictions. Similarly, if a defendant is given a fairly light sentence for conspiracy to murder because he is thought to have played a relatively minor role in the conspiracy, and then at a retrial new evidence shows that he in fact was the primary force behind the conspiracy, it is surely appropriate that he receive a more severe sentence at the retrial. It cannot seriously be doubted



that in these hypothetical situations any presumption of vindictiveness that arises from a more severe sentence at retrial is convincingly dispelled. Due process does not prevent the imposition of such a sentence.[15]

In sum, there is no relationship between the likelihood of judicial vindictive sentencing and the date of the events relied upon as a basis for imposing a more severe penalty at retrial. As long as the judge identifies on the record facts that were not known at the first sentencing proceeding and that bear on the defendant's culpability or his propensity to commit crime, the judge should be able to select a sentence that takes into account the new information, even if it is more severe than the first sentence. That is an example of commendable, rational sentencing, not unconstitutional, vindictive sentencing.

Therefore, the broad rule applied by the court below to invalidate the sentence increase in this case—namely, that a judge sentencing after a retrial can never justify imposition of a more severe sentence by relying on new information relating to events that took place prior to the first sentencing proceeding—is simply wrong. In the event the Court concludes that a presumption of vindictiveness is warranted in the situation presented here (but see Part I, *supra*), the case should be remanded to the Texas court to consider whether the factors identified by the sentencing judge reasonably justify the sentence increase.

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[15] Significantly, several courts that anticipated this Court's decision in *Pearce* and found due process constraints on the imposition of an increased sentence after a retrial did not hold that a legitimate explanation for such a sentence was restricted to events occurring after the first trial. In *United States* v. *Coke*, 404 F.2d 836 (1968) (en banc), the Second Circuit in-

## CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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voked its supervisory power to establish a rule requiring a statement of reasons for an increased sentence at retrial. The court noted, however, that these reasons could be based upon newly discovered evidence relating to earlier events, for example, new information that showed that the defendant played a more significant role in the crime than first supposed. See *id.* at 842-843, 845-846. The court explained that "[a] defendant has no vested right in an inadequate record, at least when the inadequacy results from factors beyond the prosecution's control." *Id.* at 846. Similarly, in the companion case to *Pearce*, the district court vacated the unexplained increased sentence imposed at retrial as a violation of due process. The court stated, however, that a higher sentence would be permissible so long as "there is recorded in the court record some legal justification for it." *Rice* v. *Simpson*, 274 F. Supp. 116, 121 (M.D. Ala. 1967) (footnote omitted), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd, 395 U.S. 711 (1969). See also *United States* v. *White*, 382 F.2d 445, 449-450 (7th Cir. 1967), cert. denied, 389 U.S. 1052 (1968).

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